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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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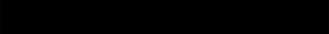
**U.S. Citizenship
and Immigration
Services**



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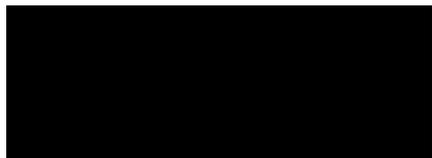
DATE: **JAN 30 2012**

OFFICE: VERMONT SERVICE CENTER FILE 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The petitioner filed a motion to reopen and/or motion to reconsider with the AAO which the AAO also dismissed. The matter is now before the AAO on a second motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner, a jewelry business, filed this nonimmigrant visa petition on September 12, 2007 seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner has employed the beneficiary as its president since November 2005 and now seeks to extend his L-1A status for two additional years.

The director denied the petition on December 21, 2007, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The AAO summarily dismissed the petitioner's subsequent appeal in a decision dated January 30, 2009, pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(v). In dismissing the appeal, the AAO noted that the petitioner failed to submit a brief or additional evidence to the AAO in support of the appeal within 30 days, and had not otherwise identified specifically an erroneous conclusion of law or statement of fact on the part of the director.

Specifically, prior to the January 30, 2009 decision, the AAO sent a facsimile to counsel requesting that a copy of the appeal brief and any additional evidence be sent to the AAO within five business days, along with evidence of the date the materials were originally filed with the AAO. Counsel faxed a six-page brief dated February 10, 2008 to the AAO, without the requested evidence that the brief was previously submitted within 30 days of filing the appeal. The AAO further noted that the brief referred twice to a U.S. Citizenship and Immigration Services ("USCIS") decision dated April 8, 2008, and therefore appeared to have been prepared in whole or in part, subsequent to February 10, 2008.

Counsel for the petitioner filed a motion to reopen or reconsider on February 17, 2009. In an accompanying statement dated February 12, 2009, counsel stated:

[T]he Appeals Department had denied the appeal on the grounds that AAO will not consider the fax by the counsel on July 8th 2008, because the consul [sic] had by mistake put the date of denial as April 8, 2008 and not December 21, 2007.

It was an honest typo error by the consul [sic] as he must have been referring to some other matter, which has been denied April 8, 2008 as there was case pertaining to the Petitioner or beneficiary with regard to that date. The USCIS should consider this as typo error and consider the draft sent by the consul [sic].

In a decision dated November 18, 2009, the AAO dismissed the motion to reopen or reconsider. The AAO determined that the motion failed to meet the applicable requirements for motions as set forth in 8 C.F.R. §§ 103.5(a)(2)(iii), 103.5(a)(2), and 103.5(a)(3).

Counsel for the petitioner filed the instant motion to reopen or reconsider on December 14, 2009. In an accompanying statement dated December 10, 2009, counsel states: "We agree with the USCIS, that the filing of the motion does not meet the requirement of Section 103.5(a) (1)(iii)(C) as the unfavorable decision has been or is the subject of any judicial proceedings."

Counsel asserts, however, that the prior motion meets the requirements of 8 C.F.R. §§ 103.5(a)(2) and (3). Specifically, counsel states the following:

In this matter, we had submitted new facts to the USCIS, i.e., we had mentioned that it was a typo error on the part of the consul [*sic*], when the draft was submitted. If the draft was made later on as suggested by the USCIS, in which the consul [*sic*] had mentioned the date of April 8th 2009, why would the consul [*sic*] mention that the case was denied on December 27th 2007. Only in the drafts, in some places, it was mentioned by mistake the date of April 8th, 2008.

The places where the date of April 8th is mentioned by mistake, we had mentioned what the USCIS had mentioned in their denial letter dated December 27th, 2007, not any other case.

Counsel further asserts that the prior motion met the requirements of 8 C.F.R. § 103.5(a)(3) as follows:

We had mentioned the reasons for reconsideration, that it was a typo error on part of the consul [*sic*] that he put the wrong date in the appeals draft.

Usually in a Motion to reconsider, there are not much precedent decisions, because it does not go [*sic*] the BIA or AAU. The Federal Court decisions should be held as precedent decision as there is no appeal from a denial of an extension of status; hence there is no precedent AAO or BIA decision, which can be submitted.

Counsel's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792

On motion, the petitioner submits (1) a statement from counsel asserting that the error identified as part of the basis for denial was a typographical error (2) an organizational chart labeled "FUTURE MANAGEMENT CHART," (3) a description of the beneficiary's proposed duties, (4) duties of the present and proposed employees of the petitioner, (5) an organizational chart labeled "MANAGEMENT CHART," and (6) a list of duties of the employees of the beneficiary's foreign employer.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). The organizational charts and position descriptions submitted in support of this motion were included in the petitioner's response to a request for evidence issued on September 25, 2007 and thus cannot be considered new evidence.

Furthermore, counsel's assertion that he timely submitted a brief in support of the appeal were considered in the AAO's prior decision and thus cannot be considered "new" evidence. Specifically, the AAO stated the following:

On motion, counsel asserts that the reference to a decision dated April 8, 2008 in a brief dated February 10, 2008, was an 'honest typo,' and that he must have been referring to some other matter involving the same parties. However, counsel has provided no reasonable explanation for a reference to an April 2008 decision in a brief that was ostensibly written in February 2008. Furthermore, the record remains devoid of evidence that counsel actually submitted the brief to the AAO within 30 days of filing the Form I-290B.

Due to the fact that counsel's assertions were previously considered and adjudicated, the assertion that "it was typo error on the part of the consult [*sic*], when the draft was submitted" cannot be considered new evidence under 8 C.F.R. § 103.5(a)(2).

In addition, the documentation presented on motion does not overcome the concerns addressed in the AAO's summary dismissal of the appeal. Counsel's explanation in the instant motion that the "places where the date of April 8th is mentioned by mistake, we had mentioned what the USCIS had mentioned in their denial letter dated December 27th, 2007, not any other case," appears to contradict counsel's earlier explanation that the April 8th date was in fact an accidental reference to "some other matter, which has been denied April 8, 2008 as there was case pertaining to the Petitioner or beneficiary with regard to that date."

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, counsel has failed to provide any evidence in the instant motion that the initial appeal brief was submitted to the AAO within 30 days of the petitioner's filing of the Form I-290B. Going on record without

(1984)(emphasis in original).

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

In addition, the motion does not satisfy the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel makes a reference to a Federal Court decision without further explanation as to why the decision applies in the instant case. Counsel does not state how the AAO failed to properly apply the law or USCIS policy.

A review of the record and the adverse decision indicates that the AAO properly applied the statute and regulations to the petitioner's case. As previously discussed, the petitioner has not met its burden of proof and the dismissal of the previous motion was the proper result under the regulation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.